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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

\_\_\_\_\_  
FLORENCE DOLAN,  
v. *Petitioner,*  
CITY OF TIGARD,  
*Respondent.*

\_\_\_\_\_  
On Writ of Certiorari to the  
Oregon Supreme Court

\_\_\_\_\_  
**BRIEF OF THE NATIONAL ASSOCIATION OF  
COUNTIES, COUNCIL OF STATE GOVERNMENTS,  
NATIONAL LEAGUE OF CITIES, INTERNATIONAL  
CITY/COUNTY MANAGEMENT ASSOCIATION,  
NATIONAL INSTITUTE OF MUNICIPAL LAW  
OFFICERS, AND U.S. CONFERENCE OF  
MAYORS AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENT**

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### **QUESTION PRESENTED**

Whether a city may attach conditions to the development of a parcel of commercial property to accommodate increased water runoff and traffic congestion that will be caused by that development, without first proving that the conditions are closely calibrated to the amount of impact associated with the development.

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**BRIEF OF THE NATIONAL ASSOCIATION OF  
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**INTEREST OF THE *AMICI CURIAE***

*Amici* are organizations whose members include state, county and municipal governments and officials throughout the United States. This case raises fundamental questions about the constitutionality of land-use regulation, an area of vital interest to *amici*.

Local governments have historically conditioned the issuance of permits for development on the implementation of measures necessary to alleviate the burdens created by that development. Such conditions are an established

means of enabling government to ensure that the burdens on the community created by development are appropriately borne by the developers that create them rather than the citizenry at large.

The power of local governments to use conditions to make possible various public improvements necessitated by development has long been recognized. *See, e.g., Ridgefield Land Co. v. City of Detroit*, 217 N.W. 58, 59 (Mich. 1928) (upholding requirement that developer provide wider streets necessary to accommodate current traffic conditions); *Allen v. Stockwell*, 178 N.W. 27 (Mich. 1920) (upholding platting ordinance requiring developers to provide sanitary sewers, surface drains, sidewalks, and street grading); *Petterson v. City of Naperville*, 137 N.E.2d 371 (Ill. 1956) (upholding requirements for curbs, gutters, and storm water drainage); *City of Bellefontaine Neighbors v. J.J. Kelley Realty & Bldg. Co.*, 460 S.W.2d 298, 303 (Mo. Ct. App. 1970) (“The City may refuse to permit such subdivision development unless that expense [of streets] is borne by the subdivider.”). *See also Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring and dissenting) (noting that the existence of “the common zoning regulations requiring subdividers . . . to dedicate certain areas to public streets[] are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion”).

The ability to condition development in this manner is integral to the functioning of local government in the critical area of land use regulation. Because the Court’s decision will have a substantial effect on matters of great importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.<sup>1</sup>

#### STATEMENT

*Amici* adopt Respondent’s statement of the case.

<sup>1</sup> The parties’ letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

#### SUMMARY OF ARGUMENT

1. The City of Tigard has conditioned Dolan’s proposed intensification of development of downtown commercial property on the implementation of specific measures designed to mitigate two effects that unquestionably will flow from that development: increased water runoff and increased traffic. Without a doubt, the proposed conditions further the legitimate and important government interests in preventing flooding and traffic congestion. Dolan argues, however, that these development conditions represent an unconstitutional taking of her property, because the City has not proven a closely calibrated proportionality between the amount of increased runoff her development will cause and the amount that the City’s flood control measures will accommodate, nor between the amount of increased traffic the development will generate and the amount that will be accommodated by the City’s bicycle path.

Neither *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), nor any other decision of this Court requires such an outcome. On the contrary, *Nollan* reaffirmed that local governments may legitimately invoke their land-use powers to impose conditions on development, as well as to prohibit development entirely. *Id.* at 836-37. It was the absence of any direct relationship between the development conditions in *Nollan* and the burdens the Commission sought to address that resulted in the finding of a taking in that case. *See id.* at 838-39.

Because *Nollan* did not address a situation such as the one now before the Court, in which this cause-and-effect relationship is direct and undisputed, *Nollan* does not require reversal here. The question squarely presented in this case is one which the Court in *Nollan* did not have to reach—what degree of “fit” is constitutionally required between the condition imposed and the burden created by the development. *See id.* at 838. And even if *Nollan* had articulated the degree of proportionality required be-

tween development conditions and burdens, any pronouncements as to the degree of "fit" appropriate within *Nollan's* factual context would not be controlling here. The condition imposed in *Nollan*—a grant of public access across private residential property—is far more intrusive than the conditions at issue here, which are imposed upon downtown retail property that is already open to the public.

2. The question left open in *Nollan* as to the proper degree of fit should be answered here in a manner consistent with this Court's takings cases and with its jurisprudence in other areas involving the constitutionality of social and economic legislation. *Amici* submit that a rational relationship test strikes an appropriate and workable balance between the interests of property owners and the legitimate needs of government.

The proportionality test advocated by Dolan, in contrast, would place unworkable burdens on local governments in a manner inconsistent with this Court's traditional deference to governmental action. The takings analysis proposed by Dolan would erroneously shift the burden of proving a Takings Clause claim from the developer to the government. It would require a city that has articulated a rational relationship between development conditions and the unique burdens of development within a particular area to then prove that, with respect to a particular parcel of land, the conditions do nothing more than exactly offset the effects of the proposed development. Such an approach would unseat the traditional presumption of constitutionality and deference to municipalities' legitimate exercise of the police power.

Moreover, Dolan's novel and unwieldy test would require the City to demonstrate a degree of exactitude and precision between burdens and conditions that the Court has never before required of local governments and which is patently inappropriate here. Because land-use regulation depends on comprehensive planning to provide inte-

grated solutions within a given area, and because property owners benefit not only from conditions imposed on their own property but from similar impositions on neighboring properties, a mathematical analysis conducted on a parcel-by-parcel basis is wholly inappropriate as a gauge of constitutionality. As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and as the Court has reaffirmed on many occasions since, the Takings Clause is satisfied where a regulation provides "an average reciprocity of advantage." See, e.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting).

When the development conditions imposed on Dolan are analyzed in accordance with a rational relationship test, it is clear that no taking has been effected in this case. The City's development permit conditions do not single out Dolan to pay for public improvements or deprive her of desired economic uses of her land. Instead, the City has responsibly exercised its authority to regulate land use to counteract the consequences that would result from Dolan's proposed plan of development, in a manner that benefits Dolan as well as other citizens. This Court's cases do not require more.

## ARGUMENT

### I. *NOLLAN* DOES NOT CONTROL THE OUTCOME OF THIS CASE

This case presents the important question whether local governments have the power to accommodate the interests of private developers with concerns for flood control and the need for workable transportation systems, without first proving that the accommodation selected is directly proportionate to the specific impacts of development on individual parcels of property. Contrary to the assertions of Dolan and her *amici*, neither *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), nor any other decision rendered by the Court provides a basis for answering this question in the negative.

**A. In This Case, Unlike *Nollan*, The Development Conditions Imposed By The City Directly Relate To The Burdens Created By The Proposed Development**

Simply put, *Dolan* is not *Nollan*. In *Nollan*, the California Coastal Commission had conditioned its grant of permission to the owners of private beachfront property to rebuild their home on their transferring to the public an easement across their property. The Court found a taking in that case because it found no direct relationship between requiring the Nollans to transfer this "classic right-of-way easement" (*id.* at 832 n.1) as a condition of their receiving a building permit, and the public objective allegedly served by the condition. *See id.* at 838-39. The Court nevertheless reaffirmed that local governments may legitimately exercise their land-use powers to attach conditions to development permits, as well as to prohibit development altogether. *Id.* at 835-37.

The Court spelled out in *Nollan* the consequences of the absence of the "essential nexus" between the conditions imposed on a development permit and the stated governmental purposes. 483 U.S. at 837. There, the Court found it "quite impossible to understand" how the condition at issue—granting the public an easement across the Nollan's private beachfront property—would serve the asserted government purpose of "reduc[ing] obstacles to viewing the beach created by the new house." *Id.* at 838. In such a case, the "imposition of the permit condition cannot be treated as an exercise of [the Commission's] land-use power." *Id.* at 839. *Nollan*, therefore, specifies the outcome where there is no direct connection between the conditions a local government seeks to place on development and the land-use burdens created by that development. *See id.* at 838-39 ("there is *nothing* to" the Commission's argument that permit conditions were linked to limitations on beach access occasioned by the development) (emphasis added).

The *Nollan* Court did not, however, address the situation presented here, in which a direct relationship plainly

exists between the conditions imposed by the City and the burdens created by Dolan's proposed development. Without a doubt, increasing the impervious area of a site leads to increased runoff from that site. Likewise, increasing the intensity of commercial development leads to increased traffic. The question presented here is one that *Nollan* never broached—whether, where a nexus exists between a development's burden and the development conditions imposed on it, a mathematical relationship between the two must also be demonstrated, and, if so, what degree of proportionality is required. Indeed, the Court in *Nollan* "accept[ed] for purposes of discussion, the Commission's proposed test [a reasonable relationship test] as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailored standards." 483 U.S. at 838.

In short, *Nollan* decided an issue not presented here—the consequences of the complete absence of any direct relationship between development conditions and burdens. It did not reach the central issue in this case—what degree of calibration or "fit" between conditions and burdens is constitutionally required. For this fundamental reason, *Nollan* does not control the outcome in this case.

**B. *Nollan* Involved An Easement For The Public Across Private Residential Beachfront Property And Did Not Address The Far Less Intrusive Development Conditions Presented In This Case**

Even if the *Nollan* Court had decided the degree of "fit" that would be constitutionally required in the factual context before it, *Nollan* still would not control the outcome of this case. The permit conditions presented in this case are far less intrusive than the one at issue in *Nollan*. Consistent with other precedents, *Nollan* did not reach beyond the facts in the case before it to address the implications of less intrusive development conditions on downtown commercial property, such as those at issue here.

*Nollan* was decided within the context of one of the most intrusive permit conditions imaginable—a grant to the public of continuous, physical access across private residential property. Cf. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (noting unusually serious character of a “physical invasion” in context of navigational servitude upon privately-owned marina). The condition imposed in *Nollan* was thus a substantial interference with the Nollans’ reasonable, investment-backed expectations for the use of their property. See, e.g., *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2291 (1993) (quoting *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 226 (1986)); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

Here, in contrast to the private residential beachfront property that was involved in *Nollan*, Dolan owns commercial property located in the heart of downtown Tigard, onto which she has invited the public for her own economic gain. Because Dolan did not purchase the property with any expectation of excluding the public or of obtaining seclusion and solitude, the conditions placed on her development are far less intrusive than the one imposed in *Nollan*.

In the related context of physical invasions not tied to development permits, the Court has made it clear that the fact of a physical invasion is of significantly less import where the property, albeit privately owned, already is “open to the public at large.” *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). In *PruneYard*, the Court distinguished *Kaiser Aetna* on the ground that the marina at issue in that case “was open only to fee-paying members, and the fees were paid in part to ‘maintain the privacy and security of the pond.’” *Id.* at 84 (quoting *Kaiser Aetna*, 444 U.S. at 168). By contrast, in *PruneYard* the landowners had “open[ed] the property] to the public for the purpose of encouraging the patronizing of [their] commercial establishments,” *id.*

at 77, indicating that the “right to exclude others” was not essential “to the use or economic value of their property.” *Id.* at 84. And in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court distinguished *PruneYard* by relying in part on the fact that “the owner had not exhibited an interest in excluding all persons from the property.” 458 U.S. at 434 (quoting *PruneYard*, 447 U.S. at 84).

Because the development conditions in this case are far less intrusive than the ones at issue in *Nollan*, the degree of fit that might be proper in a *Nollan* situation would not be controlling in this case. Since the Court in *Nollan* declined even to decide the proper degree of “fit” within the factual context before it, *Nollan* clearly does not provide any guidance as to the degree of “fit” applicable in the very different factual context presented here.

## II. UNDER A PROPER ALLOCATION OF THE BURDEN OF PROOF AND THE CORRECT LEGAL STANDARD, THE CITY HAS NOT TAKEN DOLAN’S PROPERTY

The purpose behind the Takings Clause is to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This goal requires the Court to strike a balance between the protection of individual property interests and the need of government to function for the collective good:

Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*. “Government hardly could go on if to some extent values incident to property

could not be diminished without paying for every such change in the general law.”

*Andrus v. Allard*, 444 U.S. 51, 65 (1979) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). The right to use one’s property as one chooses is not absolute. See *Nollan*, 483 U.S. at 834.

Dolan’s argument that the permit conditions in this case constitute a taking consists of two parts. First, she argues that the City did not adequately prove that her development proposal warranted its decision to condition her building permit on the dedication of the greenway and the land for the pedestrian-bicycle path. This aspect of Dolan’s argument raises issues relating to the burden of proof in a takings claim and the quantum of proof that satisfies it.

Second, Dolan maintains that there is an insufficient connection between the purpose of these exactions—mitigation of the impact of her development on the public health and safety—and the impacts themselves. She insists that the exactions must be strictly proportional to the impact of her development. Otherwise, she claims, the City is forcing her to bear the burden of general public improvements that are more properly the responsibility of government.

Both aspects of Dolan’s argument misapprehend the process of land-use planning as well as the balance that the Takings Clause strikes between individual property interests and the obligation of government to act for the collective public good. First, she urges a constitutional rule that would shift to government the burden of proving, at the outset, the reasonableness of every decision to condition the issuance of a building permit. This is fundamentally inconsistent with this Court’s cases that place the burden of proof squarely on those who challenge the constitutionality of social and economic legislation. See *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101-02 (1993) (collecting cases). Second,

Dolan’s rule would hold government to a novel and unwieldy standard of precision, which is likewise at odds with the Court’s precedents which consistently require only a rational basis for social and economic legislation.

**A. A Rational Relationship Test Strikes The Appropriate Balance Between The Protection Of Private Property Interests And The Need To Pursue Legitimate Government Objectives**

**1. Dolan’s Takings Clause Theory Erroneously Shifts The Burden of Proving Her Claim To the City**

Dolan’s view of this case places the burden of proof—the burden of proving that a condition is *not* a taking—squarely upon the City. Notwithstanding her own failure even to attempt to prove that the conditions imposed by the City are unreasonable,<sup>2</sup> and notwithstanding the showing made by the City in the plans,<sup>3</sup> Dolan asks the Court to find a taking in this case simply because the City did not prove independently of its existing comprehensive land-use plan that her particular development plans necessitate the conditions.

As a legal matter, this allocation of the burden of proof would abruptly reverse the presumption of constitutionality that state and municipal legislative enactments traditionally enjoy. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595-96 (1962).<sup>4</sup> Such a re-

<sup>2</sup> Dolan did not provide the required information regarding drainage and traffic impact in her permit application, Respondent’s Brief at 4-6, and has not ever brought forth any evidence even suggesting that the conditions overcompensate for the harms that her development will cause. *Id.* at 18.

<sup>3</sup> *Amici* refer to the City’s Comprehensive Plan, see Respondent’s Brief at 1 n.2, Master Drainage Plan, see *id.* at 6, and bicycle-pedestrian pathway plan, see *id.* at 11, collectively as “the plans.” See generally briefs of amici State of Oregon and 1000 Friends of Oregon *et al.*

<sup>4</sup> See also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 (1992) (noting this Court’s “usual assumption that the legis-

versal would indeed be a weighty step, as this presumption is soundly rooted in the democratic principle of separation of powers, which vests the right and duty to define the scope and means of implementing the public interest in legislative bodies rather than in courts. See *Berman v. Parker*, 348 U.S. 26, 32, 35-36 (1954); *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905). Deference to the judgments of local governments in the area of land-use regulation is of particular importance given the sensitive and complex determinations that such regulation demands. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979). Dolan thus seeks nothing less than a radical reversal of this traditional rule of deference.

To be sure, because the Takings Clause requires compensation when regulation "goes too far," the government must articulate a rational basis for imposing conditions upon a landowner's development of her property. As discussed in Part II.A.2, *infra*, municipalities generally do so through their comprehensive land-use plans and implementing ordinances. In Tigard this occurs during the

lature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned") (citations omitted); *United States v. Sperry Corp.*, 493 U.S. 52, 62 (1989) (Court defers to legislative judgment in determining whether fee is a taking); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 134-35 (1978) (Court unwilling to reject judgment of city council that ordinance benefits members of the community economically and by improving quality of life); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like"); Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 Urb. Law 1, 12-13 (1992); Nicholas V. Morosoff, Note, "'Take' My Beach, Please!": *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. Rev. 823, 860-61 (1989).

City's permit approval process: When the City approves, rejects or conditions an application, it must state the findings and conclusions on which it based its decision. See Tigard Community Dev. Code § 18.120.180A.

The Takings Clause, however, does not require the City to prove that the conditions it imposes are not unreasonable *each time* it seeks to condition a development permit. Rather, the landowner asserting a Takings Clause claim bears the burden of proving the City's exercise of the police power unreasonable. See *Goldblatt v. Town of Hempstead*, 369 U.S. at 596; see also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2909 (1992) (Blackmun, J., dissenting). This allocation of the burden is particularly appropriate where, as here, the City has expressly declared the purpose behind the condition.

Given especially this specific declaration by Congress that the deductions are intended to reimburse costs incurred by the United States, the burden must lie with Sperry to demonstrate that the reality of [the statute] belies its express language before we conclude that the deductions are actually takings.

*United States v. Sperry Corp.*, 493 U.S. at 60. Accordingly, the obligation was on Dolan to produce evidence that the permit conditions unfairly required her to shoulder a public burden, not on the City to show that they did not.

The practical consequences for government of the burden-shifting that Dolan advocates would be very substantial. As discussed in Part II.A.2, *infra*, Dolan's standard would require state and local governments to meet that burden with a degree of precision and exactitude never before required by the Court in this context.

2. *The Proportionality Demanded By Dolan Is At Odds With The Realities Of Comprehensive Land-Use Planning, As Well As With The Constitution*

Dolan's insistence on an individual analysis of development impact is at odds with the nature of land-use planning properly undertaken by the City and other localities. Contrary to Dolan's assumption, state and local governments do not conduct land-use planning on a parcel-by-parcel basis—they plan for the area as a whole, thus allowing for the “‘reciprocity of advantage’ that Justice Holmes referred to in *Pennsylvania Coal*.” *Keystone*, 480 U.S. at 491. *See Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) (“There is no indication that the appellants’ 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city’s exercise of its police power.”); *Penn Central*, 438 U.S. at 133-35; *id.* at 147 (Rehnquist, J., dissenting); *Berman v. Parker*, 348 U.S. 26, 29, 34 (1954) (holding that it is permissible to “attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis”); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 388; Charles M. Haar, “*In Accordance With A Comprehensive Plan*,” 68 Harv. L. Rev. 1154, 1155 (1955).

Oregon municipalities in particular have long regulated land-use through comprehensive plans, like the City’s. *See Fasano v. Board of County Comm’rs*, 507 P.2d 23, 27 (Or. 1970). The focus of comprehensive plans and the resulting land-use ordinances and regulations—which are, at bottom, an exercise of the municipality’s police power—is to provide integrated solutions to municipal land use problems. Municipalities carry out these plans through ordinances, such as the dedication ordinance at

issue in this case. *See id.* Such comprehensive planning is tailored to anticipate and remedy the problems posed by specific kinds of development in specific areas. As the Court observed in *Berman*:

[I]t is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner’s standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.

348 U.S. at 35.

a. *The City Anticipated The Impact Of Dolan’s Development In Its Comprehensive Land-Use Plans*

Although the City did not commission an independent study of the specific impact that Dolan’s proposed development would have on Fanno Creek and downtown traffic congestion, the substantial drainage and traffic studies underlying the plans anticipated the impact of her proposed development and provided a necessary and integrated response to it. Because the City based the ordinances requiring the condition upon this comprehensive planning process, it is entitled to rely on those findings and conclusions to demonstrate the rational basis for the permit conditions.

The City and other *amici* describe in considerable detail the history of land-use planning in the City and in Oregon generally, the statutory underpinnings of the City’s planning process, the studies and planning undertaken by the City and the resulting plans and enacting

ordinances. See Resp. Br. at 1-13; see also Br. Am. Cur. 1000 Friends of Oregon/APA at 4-12. As these descriptions make clear, the City based its judgments regarding the threat of flooding and traffic congestion on a thorough understanding of the land itself and of usage patterns in the area as a whole, not on a piecemeal assessment of individual parcels. "This interference with . . . property rights . . . arises from a public program that adjusts the benefits and burdens of economic life to promote the common good, and, under our cases, does not constitute a taking requiring Government compensation." *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2290 (1993) (quoting *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986)).

Dolan's takings claim overlooks the individual and collective advantages of comprehensive land-use planning. Her lot is not the only one affected by Fanno Creek; likewise, not only do she and the public benefit as the conditions mitigate the impact of her development, but she benefits as well (along with the public) when the plans apply the same conditions to her neighbors. Like zoning, the plans map out the City's overall plan for combatting this and other problems on a City-wide scale and apportion the benefits and burdens of its flood and traffic control strategy within each area. See *Agins*, 447 U.S. at 262. It was rational for the City to conclude that the public interest in protecting against the dangers of flooding and traffic congestion requires property owners in the area to dedicate land to ameliorate the increased harms caused by new development.

Far from burdening individual landowners with the costs of solving collective land-use problems, the plans, which Dolan characterizes disparagingly as "long-standing plan[s]" to acquire property for public improvements at no cost, Petitioner's Brief at 16, serve to avoid the singling out of Dolan or any other City property owner to bear

unfair public burdens. See *Penn Central*, 438 U.S. at 132 (historic preservation ordinance was comprehensive plan to preserve structures of historic and aesthetic importance and thus survived takings challenge). Moreover, the plans embody the degree of study and careful planning consistent with the City's obligations under the Takings Clause. Accordingly, when the plans call for the imposition of a particular condition on a particular parcel of property, the City cannot be liable for a taking unless Dolan proves that the condition requires her to bear an unreasonable public burden.

b. *The Constitution Does Not Mandate Stringent Proportionality Between Burden And Condition*

Development permit conditions are extremely important to state and local governments' ability to regulate growth and development in the public interest.<sup>5</sup> Without them, government would be deprived of an effective means of redressing social costs that would otherwise result from development. This case presents a characteristic example.<sup>6</sup> The plans and the studies underlying them

<sup>5</sup> See, e.g., Nicholas V. Morosoff, Note, "'Take' My Beach, Please!": *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. Rev. 823, 847-50 (1989); Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 Law & Contemp. Probs. 51, 55-68 (1987).

<sup>6</sup> A wide variety of development conditions and use restrictions have been upheld by lower federal courts since *Nollan*. See, e.g., *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 611, 616 (9th Cir. 1993) (removal of billboards); *Commercial Builders v. Sacramento*, 941 F.2d 872, 874-75 (9th Cir. 1991) (permit fee to fund construction of low-income housing), *cert. denied*, 112 S. Ct. 1997 (1992); *Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696, 699 (9th Cir. 1991) (off-site conditions designed to mitigate environmental impact); *St. Bartholemew's Church v. City of New York*, 914 F.2d 348, 357 n.6 (2d Cir. 1990) (denial of application to demolish building designated as landmark), *cert. denied*, 499 U.S. 905 (1991); *Naegle Outdoor Advertising, Inc. v.*

amply demonstrate that development along Fanno Creek increases the likelihood that it will flood, causing harm to numerous property owners and indirectly taxing the City as a whole. Resp. Br. at 6-10. Similarly, the City projected that development in the central business district would measurably increase traffic, congesting roads and jeopardizing access by emergency vehicles. *Id.* at 10-12. These impacts lead logically, indeed, ineluctably, to the permit conditions that the City imposed in this case. It is impracticable, if not impossible, to measure either the extent of the impact or the efficacy of the conditions with pinpoint accuracy. However, municipalities are entitled to require conditions like these, which bear "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy," and do not impose unfair public burdens on individual landowners. *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring and dissenting).

As Justice Scalia noted in *Pennell*, "regulations requiring subdividers . . . to dedicate certain areas to public streets[] are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion." *Id.* at 20. Tigard's requirements that Dolan dedicate a portion of her land for a bikepath to reduce traffic congestion and land in a floodplain to address the harm caused by the increase in the impervious surface area of her new store, certainly satisfy the "cause and effect relationship" between the social evil and the regulation identified by Justice Scalia. The exactions are therefore well within the traditional exercises of land-use regulation which are non-compensable under the Takings Clause.

*City of Durham*, 844 F.2d 172, 178 (4th Cir. 1988) (retroactive ban on billboards); *Pengilly v. Multnomah County*, 810 F. Supp. 1111, 1113 (D. Or. 1992) (dedication of right-of-way space for widening road); *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 606-07 (M.D. Fla. 1989) (denial of permit for beach construction).

Moreover, regardless of whether Tigard's conditions comport with the tradition of non-compensable land-use regulations, the fact remains that Dolan receives a tangible benefit from the City's floodplain regulation and bikepath development. In the regulatory takings context, the Court has never held that the Takings Clause requires mathematical exactitude between the costs and benefits of a particular regulation. Rather, the Court has recognized:

The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

*Keystone*, 480 U.S. at 491 n.21. Similarly, in *United States v. Sperry Corp.*, the Court rejected a takings challenge brought by American claimants who had prevailed in proceedings before the Iran-United States Claims Tribunal against the government's automatic 1½% deduction from their awards:

This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a "fair approximation of the cost of benefits supplied."

493 U.S. at 60 (quoting *Commonwealth of Massachusetts v. United States*, 435 U.S. 444, 463 n.19 (1978)). See also *Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 967 F.2d 648, 654 (D.C. Cir. 1992) ("As long as the amount taken is 'a fair approximation of the cost of the benefits supplied,' additional compensation is not required." (citations omitted)).

Furthermore, because land-use regulations imposed on individual pieces of property provide reciprocal benefits to neighboring properties within the area, the Constitution does not require development conditions to be calibrated to development burdens on a structure-by-structure basis. As Justice Holmes stated in *Pennsylvania Coal*, as long as a regulation provides "an average reciprocity of advantage," it satisfies the Takings Clause. 260 U.S. at 415. See also *Penn Central*, 438 U.S. at 139-40 (Rehnquist, J., dissenting) ("any such abstract decrease in value [from a zoning restriction on land use] will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties"). Here, requiring the City to prove with exactitude the precise amount of additional runoff and traffic congestion that Dolan's development would generate and limiting development conditions to a precise mathematical offset of those impacts would fail to take into account the fact that Dolan's property is not hermetically sealed from the surrounding world. Instead, it is entirely proper for the City to impose flood and traffic control measures on Dolan's property that have positive spillover effects on surrounding properties, because similar impositions on those surrounding properties will reciprocally benefit her.

Apart from its lack of respect for and deference to local government, a constitutional rule requiring a tight mathematical fit between impact and condition also would impose tremendous burdens on the judiciary. The uncertainty in determining whether, under the facts of a particular development proposal, the conditions fit closely enough would undoubtedly force more land-use controversies into the courts. Not only would this needlessly burden the courts with cumbersome, fact-intensive inquiries,<sup>7</sup> thus turning them into super planning boards, but

<sup>7</sup> Indeed, this Court has repeatedly recognized the difficulty in fashioning a concrete rule to govern Takings Clause claims and has acknowledged that "[r]esolution of each case . . . ultimately calls as

it can only delay developers' own efforts to obtain development permits. Such a result defies not only the Constitution but also common sense.

## **B. The Permit Conditions Required By The City Do Not Take Dolan's Property**

### **1. The City Demonstrated The Reasonableness Of The Conditions Through Its Comprehensive Plans And Dolan Did Not Attempt To Rebut That Showing**

The City demonstrated the reasonableness of the conditions in its comprehensive plans. The City's brief, Resp. Br. 1-13, explains in detail the legislation underlying the City's land-use planning efforts, the studies it undertook, the findings and conclusions resulting from those studies, the City ordinances resulting from those conclusions and the planning needs they identified. See also 1000 Friends Br. 4-12. Without repeating those descriptions, *amici* respectfully submit that they compel the conclusion that there was a rational relationship between Dolan's proposed development and the conditions imposed by the City.

The City's permit conditions address directly the public health and safety issues identified by the City. Dolan seeks to increase significantly the amount of impervious surface on her land, which directly affects the flow of rainfall into Fanno Creek. Resp. Br. at 7, 14. She also seeks to increase the square footage of retail space on her land by more than 80 percent in this phase of the development alone, Pet. Br. at 3,<sup>8</sup> which foreseeably increases the

much for the exercise of judgment as for the application of logic." *Andrus*, 444 U.S. at 65. See also *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986); *Connolly*, 475 U.S. at 224; *Penn Central*, 438 U.S. at 123-24.

<sup>8</sup> Dolan apparently plans a second phase of development on her property that will include additional retail space. Resp. Br. at 1.

amount of traffic flowing in and through the central business district. Resp. Br. at 10-12. The City's drainage and transportation studies project a measurable impact on the City's resources, natural and infrastructural, from this development, and the City made extensive findings to that effect in ruling on Dolan's permit application. Resp. Br. at 14-17. The permit conditions imposed by the City mitigate these effects directly and permit the City access to address other, more systemic impacts at its own cost.<sup>9</sup> The City's anticipation of and advance planning for development impacts more than adequately protect Dolan's individual property interests.

Dolan, on the other hand, presents nothing in opposition to the City's showing other than a generic objection to the permit conditions. She did not include her own projections of drainage or traffic impact in her permit application, as she was required to do. Resp. Br. at 4-6. She did not include any evidence of unreasonable burden in her application for a variance or at any point during the litigation in the Oregon state courts. Resp. Br. at 4-6, 18-19. Indeed, Dolan ignores the extensive study and documentation underlying the plans and offers nothing undermining the correctness of their conclusions. She argues only that the City's failure to make individual findings of impact documenting the exact relationship between impact and condition necessarily invalidates the permit conditions. For this reason alone, Dolan has wholly failed to carry her burden of proof and cannot establish a violation of the Takings Clause.

## 2. *Under This Court's Multi-Factor Test, The City Did Not Take Dolan's Property*

Even apart from Dolan's failure to come forward with evidence supporting her takings claim, application of this

<sup>9</sup> For example, the City plans to undertake flood control improvements along Fanno Creek at its own expense. The greenway dedication ensures that the City will have access to the Creek in order to implement these improvements. Resp. Br. at 10.

Court's "multi-factor" test to the facts of this case makes plain that the City did not take her property. First, the "character of the governmental action" does not support the conclusion that a taking has occurred because, as discussed in part I.A., *supra*, the conditions are rationally related to the burdens of the proposed development. *Penn Central*, 438 U.S. at 124.

Second, the conditions do not impose a severe economic impact on Dolan. *See id.* at 124. Neither the greenway nor the pedestrian-bicycle path dedication interferes with her plans to build on her property or to operate her business. Notwithstanding her inability to use the dedicated portions of her land for commercial purposes, Dolan would derive the same economic benefits—based on the success of her plumbing and electrical store—from her property with or without these conditions. *See id.* at 136 (historic preservation ordinance allowed property owner "not only to profit . . . but also to obtain a 'reasonable return' on its investment"). This stands in stark contrast to the wide variety of land-use regulations that this Court and others have upheld despite considerable restriction of the owner's ability to derive desired economic benefits.<sup>10</sup>

Finally, the conditions do not interfere with Dolan's reasonable investment-backed expectations. *See id.* at 124. Dolan should have expected, based upon the City's plans and the experience of other downtown and Fanno Creek property owners, that her development would require measures to mitigate its drainage and traffic impact. The Master Drainage Plan requires the entire Fanno Creek stream channel to be available for the City's flood control improvements. *See City of Tigard*

<sup>10</sup> *See Goldblatt*, 369 U.S. at 592-93 (ordinance preventing owner of sand and gravel pit from using land for that purpose altogether); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (ordinance ordering total destruction of ornamental cedar trees to protect neighboring apple trees from disease); *Hadacheck v. Sebastian*, 239 U.S. 394, 413-14 (1915) (ordinance preventing owner of brickyard from using land for that purpose altogether).

Resolution 91-66, reprinted in Pet. App. at G-38-G-40. Similarly, the pathway system along Fanno Creek near the subject site is already partly constructed in both directions. *Id.* at G-25. Compliance with the City's conditions here falls squarely within any reasonable set of investment-backed expectations that Dolan could have held.<sup>11</sup>

Properly viewing Dolan's property interest as a whole,<sup>12</sup> the advantages she derives from the ability to develop her property manifestly offset the impact of the mitigation measures required by the City. The Court's analogy in *Keystone*, 480 U.S. at 498, between coal pillars and building setback requirements holds true for the greenway and pedestrian-bicycle path dedication requirements in this

<sup>11</sup> See, e.g., *Concrete Pipe*, 113 S. Ct. at 2291-92 (employer "could have had no reasonable expectation that it would not be faced with liability for promised benefits"); *Lucas*, 112 S. Ct. at 2894 n.7; cf. *id.* at 2903 (Kennedy, J., concurring) (referring to "owner's reasonable, investment-backed expectations" as point of reference for the value inquiry); *United States v. Locke*, 471 U.S. 84, 107 (1985) ("Regulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006-07 (1984) ("[Monsanto] can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission"); *PruneYard Shopping Center v. Robins*, 447 U.S. at 84 (shopping center owner failed to demonstrate that regulation preventing center from excluding certain people defeated reasonable investment-backed expectations).

<sup>12</sup> This Court consistently has held that Takings Clause analysis properly focuses on whether the property owner's interest as a whole has been unfairly infringed, not on whether government has "taken" one stick from the overall bundle of rights making up that property interest. See *Keystone*, 480 U.S. at 497; *Andrus*, 444 U.S. at 65-66; *Penn Central*, 438 U.S. at 130; *Pennsylvania Coal*, 260 U.S. at 419 (Brandeis, J., dissenting). See also Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. Colo. L. Rev. 599, 611-15 (1991).

case: The fact that the permit conditions require Dolan to dedicate, and thus not to develop, certain portions of her property does not distinguish those segments for Takings Clause purposes. The portions of her property to which the conditions apply, which were never part of Dolan's development plan, are only one element of her property interest, the diminution of which does not by itself constitute a taking. See *Keystone*, 480 U.S. at 498 (citing *Andrus*, 444 U.S. at 65-66). Where, as here, the conditions create a clear benefit to the public—as well as to Dolan herself—while imposing a comparatively slight harm on the developer, the City does not run afoul of the Takings Clause. *Texaco, Inc. v. Short*, 454 U.S. 516, 529-30 (1982); see also *Miller v. Schoene*, 276 U.S. at 279-80. To the contrary, the requirement that Dolan dedicate a portion of her land as part of a development permit is, like other reasonable land-use regulations, "a burden borne to secure 'the advantage of living and doing business in a civilized community.'" *Andrus*, 444 U.S. at 67 (quoting *Pennsylvania Coal*, 260 U.S. at 422 (Brandeis, J., dissenting)).

### CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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